No. 90-404

FILED
MAR 6 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

ILLINOIS STATE LABOR RELATIONS BOARD, ET AL.,
PETITIONERS

v.

ILLINOIS NURSES ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAURENCE S. ZAKSON
Attorney
National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the National Labor Relations Act preempts the Illinois State Labor Relations Board's jurisdiction over an unfair labor practice charge concerning the employees of a private company that performs contract services for the State of Illinois.

TABLE OF CONTENTS

Page

Statement 1
Discussion 7
Conclusion 18

TABLE OF CONTENTS

Cases:

Construction Laborers v. *Curry*, 371 U.S. 542 (1963) 16
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 17
Hudson Distributors v. *Eli Lilly*, 377 U.S. 386 (1964) 17
International Longshoremen's Ass'n v. *Davis*, 476 U.S. 380 (1986) 9, 10, 11, 16
LaCrosse Telephone Co. v. *Wisconsin Bd.*, 336 U.S. 18 (1949) 11
Long Stretch Youth Home, 280 N.L.R.B. 678 (1986) 7
Marine Engineers Beneficial Ass'n v. *Interlake Steamship Co.*, 370 U.S. 173 (1962) 10
NLRB v. *Natural Gas Utility Dist.*, 402 U.S. 600 (1971) 6, 11-12, 13
NLRB v. *United Insurance Co.*, 390 U.S. 254 (1968) 14
Res-Care, Inc., 280 N.L.R.B. 670 (1986) 7
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 8, 9, 10, 15
West v. *Atkins*, 487 U.S. 42 (1988) 15
Western Pa. School for the Deaf v. *Commonwealth Labor Relations Board*, 438 A.2d 1025 (Pa. Commw. Ct. 1982) 14

Statutes and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 2(2), 29 U.S.C. 152(2) 6, 11, 12
§ 2(3), 29 U.S.C. 152(3) 11, 14

Statutes and regulation—Continued: Page

§ 7, 29 U.S.C. 157 ..... 10, 11, 15
§ 8, 29 U.S.C. 158 ..... 10, 11, 15
§ 8(a)(5), 29 U.S.C. 158(a)(5) 10, 11
§ 9, 29 U.S.C. 159 11
Illinois Public Labor Relations Act, Ill. Ann. Stat. ch. 48 (Smith-Hurd 1986):
¶ 1601 3
¶¶ 1601-1627 2-3
¶ 1603 3
¶ 1603(o) 5
¶ 1605 3
¶ 1611 3
28 U.S.C. 1257 16
42 U.S.C. 1983 15
29 C.F.R. 102.98 6
29 C.F.R. 102.98(b) 14

Miscellaneous:

J. Donahue, *The Privatization Decision* (1989) 8
R. Fitzgerald, *When Government Goes Private* (1988) 8
National Comm'n for Employment Policy, *The Impact of City and County Contracting Out on Government Workers* (1988) 8
National Inst. of Justice, *The Privatization of Corrections* (1985) 8
Note, *Privatization of the Public Sector: A Look at Which Labor Laws Should Apply to Private Firms Contracted to Perform Public Services*, 3 Det. C.L. Rev. 805 (1986) 8

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-404

ILLINOIS STATE LABOR RELATIONS BOARD, ET AL., PETITIONERS

v.

ILLINOIS NURSES ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Illinois Nurses Association (INA) is the exclusive bargaining representative for a state-wide unit of registered nurses employed by the State of Illinois. The bargaining unit includes nurses employed at state correctional centers. Pet. App. 5, 13-14; Pet. Supp. Br. App. 3. The bargaining unit is covered by a collective bargaining agreement between INA, on the one hand, and the Illinois Department of Central Management Services and Department of Corrections (DOC), on the other. The agree-

ment expressly grants the State the right to contract out nursing services. Pet. App. 23.

In late 1984, the State opened the Shawnee medium security correctional center (Shawnee). At about the same time, the State solicited bids seeking an outside contractor to provide health care services to Shawnee's inmates. In April 1985, the State awarded the contract to Correctional Medical Systems, Inc. (Systems), a for-profit corporation whose business is to deliver health care services in correctional facilities.[1] The initial contract ran through June 30, 1986. Pet. App. 5, 15, 31; Pet. Supp. Br. App. 3-4.

Under the contract, Systems hires and manages the entire medical staff at Shawnee. Systems also furnishes all hospitalization and outpatient services to the facility.[2] Until July 1986, the State compensated Systems for these services on a cost-plus-fixed-fee basis. Since then, Systems has been compensated on a per-inmate basis. Pet. App. 15, 31-32.

2. a. In June 1985, INA filed an unfair labor practice charge against the State with the Illinois State Labor Relations Board (ISLRB). INA alleged that the State had violated the Illinois Public Labor Relations Act, Ill. Ann. Stat. ch. 48, ¶¶ 1601-1627

---

[1] As of March 1988, Systems had contracts with DOC to provide health care services at eight other correctional facilities in Illinois. Systems also had contracts with correctional facilities in sixteen other States. Pet. App. 31.

[2] At all relevant times, Systems' staff at Shawnee has included doctors, nurses, a dentist, a psychiatrist, a psychologist, a pharmacist, technicians, and clerical staff. Since July 1987, the Health Care Unit Administrator at Shawnee—the only health care employee who was ever an employee of DOC—has been a Systems employee. Pet. App. 5, 31-33; Pet. Supp. Br. App. 4.

(Smith-Hurd 1986), by refusing to apply its collective bargaining agreements with INA to the nurses at Shawnee. Pet. App. 65-66, 70.

The ISLRB dismissed the charge for lack of jurisdiction. It determined that the nurses at Shawnee were employees of a private employer (Systems) and that INA's complaint therefore fell outside the ISLRB's jurisdiction, which extends only to disputes between public employees and public employers. Pet. App. 65-66, 70-71; see Ill. Ann. Stat. ch. 48, ¶¶ 1601, 1603, 1605, 1611 (Smith-Hurd 1986). On June 5, 1987, the Illinois Appellate Court for the First Judicial District vacated the order of dismissal and remanded the case for evidentiary proceedings on the ISLRB's jurisdiction. Pet. App. 65, 68.

b. After hearing further evidence, the ISLRB again concluded that it lacked jurisdiction over the nurses at Shawnee. Pet. App. 4-5, 22-23.[3]

The ISLRB determined, first, that the nurses at Shawnee were employed by Systems, not the State. To make this determination, the ISLRB applied a "degree of control" test, explaining that such a test

---

[3] The hearing officer's analysis of the case was different from the ISLRB's, but, like the ISLRB, she concluded that the ISLRB lacked jurisdiction over INA's unfair labor practice charge. Pet. App. 58. The hearing officer determined that the State retained sufficient control over the health care employees at Shawnee to make the State and Systems joint employers, but recommended dismissal because the ISLRB lacked jurisdiction over Systems. *Id.* at 52-54, 58. The ISLRB overruled the joint-employer determination. *Id.* at 21. It found that the State activities cited by the hearing officer—which involved "establishing certain minimum qualifications for the health care unit staff and * * * conducting contractual compliance checks"—did not "diminish [System's] ultimate control over labor relations." *Ibid.*

is used by the National Labor Relations Board to determine when the NLRB should assert jurisdiction over a private employer with ties to a governmental entity that is exempt from the National Labor Relations Act (NLRA). As the degree-of-control test was described by the ISLRB, the NLRB determines whether the private employer "has sufficient control over the employment conditions of the employees involved to enable it to bargain effectively with a labor organization, as required by the [NLRA]" (Pet. App. 18-19). The ISLRB concluded that in this case Systems, not the State, "control[led] every essential term and condition of the nurses' employment" (*id.* at 22). Specifically, Systems alone (1) solicited, interviewed, and hired applicants for employment, (2) disciplined, discharged, promoted, and transferred the employees, (3) determined employee work schedules and assignments, and (4) "retained complete authority over wages and other economic terms and conditions of employment." *Id.* at 19-21.

Based on these determinations, the ISLRB further concluded that it could not assert jurisdiction on the theory that Systems was an agent of the State. The ISLRB observed that its governing statute granted it jurisdiction "only [in] those situations where the 'agent' acts on behalf of the public entity in dealing with the 'principal's' *employees*." Pet. App. 22:

> Thus, in order for [Systems] to be the State's agent, it is essential that the nurses be employees of the State. Our examination of the record, however, has revealed that the nurses of Shawnee are employed by [Systems], and not the State.

Ibid.[4] For this reason, the ISLRB concluded, "We may not assert jurisdiction over [Systems] based upon an 'agency theory.' " Pet. App. 23.

c. On appeal by INA, the Illinois Appellate Court reversed and remanded the case to the ISLRB for proceedings on the substance of INA's complaint. Pet. App. 12. The appellate court concluded that, "despite [Systems'] control over the Shawnee nurses, [Systems] is in fact a true agent of DOC in the rendering of medical services at the Shawnee Correctional Center." *Id.* at 11. The court observed that, under state law and the state constitution, "a State has an affirmative duty to provide persons in custody with a medical care system that meets minimum standards of adequacy." *Id.* at 9. In the court's view, "any corporation performing duties which are statutorily (and constitutionally) mandated as government duties, must, at the very least, be acting on behalf of the State and is, thus, an agent of the State." *Id.* at 10. The court also found that, "[e]ven though DOC permitted Systems to control" the Shawnee nurses' employment, the contract and the law vested "the right to control" in DOC. *Id.* at 10-11.

d. The State and Systems petitioned the Illinois Supreme Court for appeal as of right or, in the alternative, for leave to appeal from the Illinois Ap-

---

[4] The ISLRB's governing statute, Ill. Ann. Stat. ch. 48, ¶ 1603(o) (Smith-Hurd 1986), provides in relevant part:

> "Public employer" or "employer" means the State of Illinois, any political subdivision of the State, unit of local government or school district; authorities * * *; and any person acting within the scope of his or her authority, express or implied, on behalf of such entities in dealing with its employees * * *.

pellate Court's decision. In support of their petitions, they argued, *inter alia*, that the National Labor Relations Act preempted ISLRB jurisdiction over INA's unfair labor practice charge. Pet. App. 72-80. On June 1, 1990, the Illinois Supreme Court denied the petitions. *Id.* at 2. On July 19, 1990, the court denied motions for reconsideration but granted a motion for stay of its mandate pending the filing and disposition of a petition for certiorari. *Id.* at 1.

3. After the Illinois Supreme Court denied review, the ISLRB petitioned the NLRB for an advisory opinion on whether the NLRB would assert jurisdiction in this case. Pet. Supp. Br. App. 1; see 29 C.F.R. 102.98. On August 31, 1990, the NLRB issued an advisory opinion indicating that it would assert jurisdiction. Pet. Supp. Br. App. 13.

Adopting the state appellate court's findings of fact for purposes of the advisory ruling (Pet. Supp. Br. App. 8 n.11), the Board concluded that (1) Systems was an "employer" under Section 2(2) of the NLRA, 29 U.S.C. 152(2), and (2) Systems retained a "significant degree of control" (Pet. Supp. Br. App. 12) over the essential terms and conditions of employment of the health care employees at Shawnee, such that "it would * * * effectuate the purposes and policies of the [NLRA] to assert jurisdiction over [Systems]" (*ibid.*). In reaching the first conclusion, the Board determined that Systems was not exempt from the NLRA as a "political subdivision" of the State. *Id.* at 9 (citing *NLRB* v. *Natural Gas Utility Dist.*, 402 U.S. 600 (1971)); see 29 U.S.C. 152(2) (excepting "political subdivision[s]" from definition of "employer").[5] To reach

[5] In so concluding, the NLRB cited the state court's findings that Systems was a private corporation doing business in

the second conclusion, the NLRB applied the "degree of control" test, which guides the NLRB's discretionary determination whether to assert jurisdiction over a private employer with ties to an exempt governmental entity. Pet. Supp. Br. App. 10-12 (citing and discussing *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986) and *Long Stretch Youth Home*, 280 N.L.R.B. 678 (1986)). In applying this test, the NLRB emphasized that Systems "retained extensive if not exclusive control over employee compensation" (Pet. Supp. Br. App. 11).[6]

DISCUSSION

The NLRB and the Illinois Appellate Court have reached directly conflicting determinations as to whether this labor dispute falls within federal or state jurisdiction. The Illinois Appellate Court held that INA's unfair labor practice charge is within the ISLRB's jurisdiction. The NLRB, on the other hand, has determined that INA's charge is within the exclusive jurisdiction of the NLRB.

The clash of jurisdictional determinations results from the decision by the State of Illinois to provide health care services at the State's correctional facilities through a private contractor. That decision illustrates an increasing trend among States to contract out services that in the past were performed by state

---

several States—not just Illinois—and that Systems was an "independent contractor" rather than an administrative arm of the State. Pet. Supp. Br. App. 9.

[6] The NLRB found that any "operational control" retained by DOC "would not preclude meaningful bargaining" by Systems because "the control is exercised [by DOC] largely for security reasons," and "only [Systems] could actually terminate the nurses' employment." Pet. Supp. Br. App. 12.

employees.[7] Labor disputes involving the private employees who provide such services under contract are consequently arising with increasing frequency.[8]

With only narrow exceptions, labor disputes arising under the NLRA are to be resolved exclusively in accordance with the rights, duties, and procedures set forth in that Act. Thus, this Court has determined that the Act grants exclusive jurisdiction to the NLRB to adjudicate those disputes. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 242 (1959).

We believe that the question presented here—whether the NLRB has exclusive jurisdiction over a labor dispute involving employees of a private company that performs contract services for a State—warrants this Court's attention in light of the increasing frequency with which the question arises and the potential, illustrated here, for conflicting determinations of this question by state tribunals and the NLRB.

1. In our view, the Illinois Appellate Court erred when it held that the ISLRB has jurisdiction over INA's unfair labor practice charge.

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959), the Court held that

---

[7] See National Inst. of Justice, *The Privatization of Corrections* 55-56 (1985); see also J. Donahue, *The Privatization Decision* 131-149 (1989).

[8] See Pet. App. 25 n.8, 54-56 (discussing varying approaches of state tribunals to question presented); see generally National Comm'n for Employment Policy, *The Impact of City and County Contracting Out on Government Workers* 11-13 (1988); R. Fitzgerald, *When Government Goes Private* 80-84, 115-116 (1988); Note, *Privatization of the Public Sector: A Look at Which Labor Laws Should Apply to Private Firms Contracted to Perform Public Services*, 3 Det. C. L. Rev. 805 (1986).

"[w]hen an activity is arguably subject to Section 7 or 8 of the [NLRA], the States * * * must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." The Court based this holding on Congress's intent in the NLRA to "entrust[] administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Id.* at 242. Congress thus intended not only that labor disputes covered by the Act be resolved by federal law, but also that they be resolved exclusively by the NLRB. *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 391 (1986). For this reason, when a dispute meets the *Garmon* preemption standard, it is immaterial "whether *state* law gives the state courts jurisdiction over" the controversy; the "jurisdiction provided by state law is itself pre-empted by *federal* law vesting exclusive jurisdiction over that controversy in another body." *Davis*, 476 U.S. at 387-388. In short, "[i]f there is pre-emption under *Garmon*, then state jurisdiction is extinguished." *Id.* at 391.

The Court addressed the showing required to trigger *Garmon* preemption in *International Longshoremen's Ass'n* v. *Davis, supra.* The proponent of preemption must "advance an interpretation of the [NLRA]" that makes the dispute at issue subject to the Act and that has not been "authoritatively rejected by the courts or the Board." 476 U.S. at 395. In addition, the proponent must "put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Ibid.* This showing is required only "in the 'absence of a clear determination

by the Board'" that the dispute is subject to Sections 7 and 8 of the NLRA. 467 U.S. at 397 (quoting *Garmon*, 359 U.S. at 246).

In the present case, there *has* been a clear determination by the NLRB that the underlying dispute is subject to Sections 7 and 8.[9] In its advisory opinion, the NLRB decided that the rights and obligations of the Shawnee nurses and of Systems are governed by the NLRA. Pet. Supp. Br. App. 13. In doing so, the NLRB "actually determined the underlying issue upon which its jurisdiction depend[s]," *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 184 (1962). Although that determination is not conclusive of the issue, it should be regarded as controlling under the *Davis* standard if it is adequately supported in the record and consistent with governing law. Here, we believe that standard was fully satisfied: The conduct underlying INA's unfair labor practice charge is "arguably subject to § 7 or § 8 of the [NLRA]." *Garmon*, 359 U.S. at 245.

INA's unfair labor practice charge alleged that INA was the exclusive bargaining representative for the nurses at Shawnee. Pet. App. 29-30. Based on this allegation, INA claimed that DOC violated its collective bargaining agreement by refusing to bargain with INA over the terms and conditions of the nurses' employment. *Id.* at 30. INA's claim is arguably governed by Section 8(a)(5) of the Act, because that provision makes it an unfair labor

---

[9] We recognize that the NLRB's determination was made after consideration of the case by the courts below. But that determination, made on the basis of the state court's findings of fact, leaves no doubt that the preemption-triggering standard of *Davis* has been met.

practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5). INA's claim also implicates Section 7 of the Act, 29 U.S.C. 157, which gives employees the right to bargain collectively through representatives of their own choosing.[10]

Whether INA's claim is in fact subject to Sections 7 and 8 turns on whether the claim involves an "employer" within the meaning of Section 2(2) of the Act, 29 U.S.C. 152(2). As explained above, the NLRB answered this question in the affirmative, and the NLRB's determination was fully warranted and sufficient to trigger *Garmon* preemption.

Section 2(2) defines "employer" to exclude "any State or political subdivision thereof." In *NLRB* v. *Natural Gas Utility Dist.*, 402 U.S. 600, 604-605

---

[10] Amicus AFSCME asserts (AFSCME Amicus Br. 5 n.2) that INA's charge concerns "representation issues involving a given employer" that implicate Sections 2(2) and 9 of the NLRA. AFSCME appears to argue that, because this case may present issues under provisions of the NLRA other than Sections 7 and 8, the case does not raise a *Garmon* preemption issue. AFSCME's argument ignores Section 8(a)(5)'s reference to Section 9. See 29 U.S.C. 158(a)(5). Thus, unfair labor practice charges under Section 8(a)(5) often raise issues under Section 9 concerning the charging party's status as the duly authorized bargaining representative. See *La-Crosse Telephone Co.* v. *Wisconsin Bd.*, 336 U.S. 18 (1949) (NLRB has exclusive jurisdiction to determine representation questions involving employees covered by NLRA). More broadly, cases arguably subject to Sections 7 and 8 often present issues under other provisions of the NLRA. For example, the state action alleged to be preempted in *Davis* turned on the plaintiff's status as an employee or supervisor under Section 2(3) of the Act. 476 U.S. at 383-384. That a case requires interpretation of provisions of the NLRA in addition to Section 7 or 8 clearly does not render the *Garmon* doctrine inapplicable.

(1970), the Court noted with approval the Board's test limiting that exclusion to entities that are either "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."

The NLRB here properly applied the *Natural Gas* criteria and correctly concluded that Systems was not exempt under Section 2(2). As the NLRB observed, and the state court had found, Systems is a private corporation doing business in numerous States. Pet. Supp. Br. App. 9. Moreover, Systems' contract with DOC expressly provides that Systems acts as an independent contractor in providing health care at Shawnee. *Ibid.* For these reasons, Systems clearly did not meet the *Natural Gas* criteria for exemption, and INA does not contend otherwise here.[11]

The NLRB was also correct in determining that Systems was not exempt under the discretionary doctrine enunciated by the Board in *Res-Care* and *Long Stretch Youth Home.* Under this doctrine, the NLRB may decline jurisdiction over a private employer with ties to an exempt governmental entity, depending on

> the extent of control retained by the employer over essential terms and conditions of employment and on the degree of control exercised by the exempt entity over the employer's labor relations policies; in short, whether the employer retained "sufficient control over the employment conditions of its employees to engage in mean-

[11] Instead, INA contends (Br. in Opp. 8-9) that the NLRB erred by failing to determine whether the Shawnee nurses were employed by Systems or by the State. This contention is incorrect. The NLRB made that determination by applying the degree-of-control test.

> ingful collective bargaining." *Res-Care*, 280 NLRB at 647; *Long Stretch Youth Home*, 280 NLRB at 681-682.

Pet. Supp. Br. App. 9-10. Based on the state court's findings, the NLRB concluded that the present case was "more like *Long Stretch Youth Home* than *Res-Care*" (*id.* at 11), and that it would "therefore effectuate the purposes and policies of the [NLRA] to assert jurisdiction" (*id.* at 12). Those conclusions fully accord with NLRB precedent. See *id.* at 12 n.15 (citing cases).

The contrary conclusion of the Illinois Appellate Court is improperly based on the application of state law.[12] The court determined that, since the State was required under state law to provide health care to prison inmates, Systems acted as an agent for the State and was therefore subject to the State's labor law.[13] But, as explained, under *Garmon* principles

---

[12] See *Natural Gas*, 402 U.S. at 603-604:

> It is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law * * *. Nothing in the [NLRA's] background, history, terms or purposes indicates its scope is to be limited by * * * varying local conceptions, either statutory, or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems * * *. Thus, it is clear that state law is not controlling * * *.

[13] Amicus AFSCME erroneously contends (AFSCME Amicus Br. 4) that no federal question is presented here because the Illinois Appellate court merely "invalidated the subcontract between DOC and Systems." The court did no such thing. In fact, the court partly relied on the DOC-Systems contract in concluding that Systems was an agent of the State. Pet. App. 10-11; see also *id.* at 23 (ISLRB emphasized that its function was not to determine validity of contract).

that law is preempted in this case. It is therefore irrelevant whether, in the absence of preemption, Systems would be subject to state law.[14]

INA contends (Br. in Opp. 7-9) that the appellate court's approach accords with the approach dictated by federal law. That contention is based on INA's erroneous assertion (*id.* at 8) that, under federal law, common law agency principles would determine whether Systems was DOC's agent and therefore exempt from the NLRA.[15] As explained, Systems' status as an "employer" under the NLRA is governed by the *Natural Gas* criteria, not by common law agency principles. In any event, the appellate court's conclusion in this case conflicted with the NLRB's, and the purpose of the *Garmon* preemption doctrine is to avoid "conflicting adjudications" as well as "differ-

---

[14] The state court did not have the benefit of the NLRB's advisory opinion, but that does not justify the court's reliance on state law. The court should have examined federal law, including relevant NLRB decisions. If the court had any doubt, it could have sought an advisory opinion from the NLRB. See 29 C.F.R. 102.98(b). See also *Western Pa. School for the Deaf* v. *Commonwealth Labor Relations Board*, 438 A.2d 1025 (Pa. Commw. Ct. 1982) (court found that entity was not exempt from NLRA under the *Natural Gas* criteria, but sought advisory opinion as to whether NLRB would assert jurisdiction).

[15] INA's reliance (Br. in Opp. 7) on *NLRB* v. *United Insurance Co.*, 390 U.S. 254 (1968), is misplaced. *United Insurance* concerned the question whether insurance agents were exempt from the NLRA as "independent contractors." See 29 U.S.C. 152(3). The Court held that this question was governed by common law agency principles. *United Insurance*, 390 U.S. at 256. There is no issue here as to whether the Shawnee nurses are employees or independent contractors; they are concededly employees.

ent rules of substantive law." *Garmon*, 359 U.S. at 243.[16]

Nor does *West* v. *Atkins*, 487 U.S. 42 (1988), support INA's agency theory. See Br. in Opp. 5-6. In *West*, the Court held that a contracting physician was acting "under color of state law" when treating an inmate's injury and was therefore subject to suit under 42 U.S.C. 1983. That holding is inapposite here. As explained above, the Court in *Natural Gas* approved the criteria that the NLRB applied in this case to determine whether a private contractor is a state entity for labor law purposes.[17]

---

[16] In *Garmon*, the Court suggested that preemption may not be appropriate when conduct arguably subject to Section 7 or 8 of the NLRA comprises activities that are "deeply rooted in local feeling and responsibility." 359 U.S. at 244. INA argues (Br. in Opp. 9-10) that this is such a case, because the duty to provide medical care to prison inmates is "nondelegable" and "vested exclusively in the states." INA misapprehends the exception to preemption recognized in *Garmon*. The exception focuses on the "conduct" sought to be "regulated." *Garmon*, 359 U.S. at 244; see also *id.* at 247 (regulation of violence and imminent threats to public order constitute the type of conduct that triggers the exception). Here, the conduct in question is the failure to apply the collective-bargaining agreement between the State and the INA to the nurses employed by Systems at Shawnee. This conduct implicates the issues whether the INA is the exclusive bargaining representative of the nurses at Shawnee and whether Systems is an employer subject to the NLRA—issues at the core of federal labor policy.

[17] In finding that Systems was not an agent of DOC for labor law purposes, the ISLRB emphasized "[t]his is not to say that other evidence might establish that [Systems] is the State's agent for other purposes *not* related to labor relations"—for example, "for purposes of civil liability exposure." Pet. App. 27 n.16.

2. INA contends (Br. in Opp. 10-11) that petitioners are precluded from raising their preemption claim because the claim "was first raised in petitions to the Illinois Supreme Court in April 1990." A similar contention was expressly rejected by this Court in *Davis*, 476 U.S. at 391, 393. There, the Court held that, because *Garmon* preemption is jurisdictional, "when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court." *Id.* at 393. Contrary to INA's contention (Br. in Opp. 11), the present case cannot be distinguished from *Davis* based on the stage at which the preemption claim was raised. Here, as in *Davis*, the claim was raised by the proponent of preemption after its state-law claim was rejected. Cf. 476 U.S. at 385, 399. In any event, the concurring opinion in *Davis* on which INA relies (Br. in Opp. 11) acknowledged that, under the Court's holding, NLRA preemption "may be raised at any time." 476 U.S. at 403. INA's contention that petitioners have "waived" the jurisdictional issue presented here is therefore without merit.

3. Likewise without merit is INA's contention (Br. in Opp. 4-5) that the judgment of the Illinois Appellate Court is "not a final judgment" within the meaning of 28 U.S.C. 1257.

INA's contention is defeated by *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963). In *Curry*, the Court reviewed a state supreme court decision rejecting petitioner's claim that a state court action to enjoin labor union picketing was preempted under the *Garmon* doctrine. The Court held that the state court decision was a final judgment on the preemption issue, notwithstanding anticipated additional proceedings in state court on the merits of the state-law cause of action. *Id.* at 550. The Court emphasized

that allowing the matter to proceed to a state trial on the merits—a trial at which the union might win, thereby making it unnecessary to resolve the federal question—would seriously erode national labor policy providing for exclusive NLRB jurisdiction. *Ibid.*

The reasoning in *Curry* fully applies here. The Illinois state courts have rejected the claims of the State and of Systems that ISLRB jurisdiction was preempted under the *Garmon* doctrine. The federal issue has been "for all practical purposes concluded in the state tribunals." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 483 (1975) (discussing *Curry*). See also *Hudson Distributors* v. *Eli Lilly*, 377 U.S. 386, 389 n.4 (1964) (state supreme court's rejection of retailer's claim that state fair trade statute was preempted by federal antitrust laws was final and reviewable notwithstanding pendency of proceeding on the merits of petition for enforcement of state statute). The pendency of further state proceedings on state-law claims poses no bar to review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAURENCE S. ZAKSON
Attorney
National Labor Relations Board

MARCH 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282051 20423